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Supreme Court of the United States

OCTOBER TERM 1949

Number 260

JAMES SHEPPARD POTTS and
ADAM EMPIE POTTS,
Petitioners,

vs.

J. K. RADER, as Administrator, etc., et al,
Respondents.

PETITION FOR REHEARING AND RECONSIDERATION OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners in above-entitled cause respectfully petition this Honorable Court for rehearing and reconsideration of their petition for a writ of *certiorari* to be directed to the

Supreme Court of Arkansas; and the petitioners hereby certify that this petition for such rehearing and reconsideration is not for the purpose of delay but, to the contrary, is in an effort to secure to them a fair and impartial trial on the merits of their cause at the earliest date possible, that petitioners shall regain control of their property and its benefits without further delays which heretofore have been imposed upon them by the respondents herein.

In presenting this their petition as aforesaid, the petitioners are filing same in the belief that their original petition and supporting brief, while clearly bringing out the facts of the cause, were not sufficient to impress upon the Court the full merit and importance of petitioners' case, important to not only these petitioners but to the general public, and the significance and disastrous nation-wide consequences which may result from a failure by this Honorable Court to review and correct the errors and evil consequences resulting from the decision of the Supreme Court of Arkansas in the case here sought to be reviewed. In the hope that this Honorable Court will consider this a matter sufficiently special and important to justify and to require the exercise of its power of supervision, the case again is brought to the attention of the Court, in this petition for rehearing on its refusal to consider the case presented as originally prayed.

In connection with this petition, it is appropriate to inform the Court that these petitioners complied with every requirement to print and file promptly herein their brief in reply to respondents' brief and that said reply brief was completed on October 14, 1949, and filed in this Court on the morning of Saturday, October 15, 1949, and that *certiorari* was denied on the morning of Monday, October 17,

1949; for which reason these petitioners feel that their reply brief was not before the Court in time for such to be considered by the Court when finally acting upon the original petition of these petitioners.

It respectfully is submitted that the reply brief heretofore filed herein, as aforesaid, contains many pertinent and enlightening facts not previously discussed, and the petitioners pray that their said reply brief now be considered along with this their petition for rehearing and reconsideration.

This Court has exercised its power of supervision and has given relief in cases where the service man was prejudiced far less than in the instant situation; notably among these being *Fontaine LeMaistre* v. *Herman Leffers,* 333 U.S. 1-6, 92 L.Ed. 433, 68 S.Ct. 371, wherein the service man was protected from a tax deed against his property; and *Abraham Fishgold* v. *Sullivan, etc., Corporation,* 328 U.S. 275, 90 L.Ed. 1230, 66 S.Ct. 904 and 1105, wherein the service man was restored to his employment seniority, upon his release from the military service. The instant case, insofar as Adam Empie Potts, concerns a service man and a large and valuable cotton plantation which has been owned by his family for three generations, and which was taken from him in his absence while in military service, and while not only actively engaged but in strenuous combat with the enemy. If this Honorable Court permits such decision to stand, it will cast a permanent reflection upon both this soldier and his family and also will deprive him of his lawful inheritance.

This matter concerns Colonel Potts not as to valuable property alone, property which long has been in his family, but more than this, far more than this, because the opinion

of the Arkansas Court has put upon Colonel Potts a perpetual stigma, likening him to the litigant in *Boone* v. *Lightner* (319 U.S. 561), making it appear that Colonel Potts, a capable and distinguished soldier and honorable gentleman, has prostituted his office deliberately, when seeking the protection of an Act made and provided by the Congress of the United States for the benefit of those compelled to be absent in military service! That there be no mistake, we quote from the opinion of the Arkansas Supreme Court (beginning the last paragraph on page 186 of the record):

> "The record justifies the conclusion that the appeal to the federal statute is made for the purpose of delay, as it was in the *Boone* case, *supra.*"

What conceivable reason could this litigant have for delay, when strangers have taken over his plantation and are sapping his revenues? The reason for this appeal is to enable him to gain a speedy trial on the merits of his cause.

And to what "record" does the foregoing opinion refer, may we ask?

In said opinion (R. 185, near bottom of page) the Arkansas Supreme Court says:

> "We therefore sustain the motion to *strike this testimony from the record,* and without it we must *assume* that the evidence supported the chancellor's action." (Italics supplied)

From this it will be seen that the Arkansas Supreme Court's opinion was not at all based upon the record but was upon a mere *assumption*—after the court had stricken

from the record the evidence favorable to the petitioners herein!

And *why* was this evidence stricken from the record? The court's excuse was that a portion of the transcript, containing the testimony and other evidence taken *expressly for use in such appeal,* was delayed by the reporter of the trial court and filed late and, therefore, *could* be stricken under its "Rule 5." Yet, the portion of the transcript containing that testimony *had been filed* with the Supreme Court of Arkansas *upon that court's own orders,* which, under Arkansas statutes, suspends operation of said "Rule 5." The statute, section 2741 of Pope's Digest (Arkansas Code), reads:

> *"Copy of record filed.* It shall be the duty of the appellant to file in the clerk's office of the Supreme Court, within ninety days after the appeal or writ of error is granted, an authenticated copy of the record, otherwise his appeal or writ of error shall be dismissed; *but the Supreme Court may for cause shown extend the time for filing such copy."* (Emphasis supplied)

The Arkansas Supreme Court had issued four writs of *certiorari* commanding the trial court's delivery of such copy of the record (R. 159 to 166), in accordance with Pope's Digest section 2743. On July 12, 1948, the court reporter of the trial court had made excuses and had asked an extension of time (R. 163) within which to deliver said transcript of the record, and the Arkansas Supreme Court had granted him such extension. By its own order *per curiam* (R. 182) entered on October 18, 1948, the Arkansas Supreme Court admitted said transcript of record to be

filed—in accordance with the statute, section 2741 of Pope's Digest, upon which such Rules of the Supreme Court of Arkansas are based [see Rule 7(b)]. [These Rules are carried in a prefatory appendix to volume 207 of Arkansas Reports (207 Ark.), pages xvii to xxxvii.]

By its above-stated action, these petitioners contend that the Supreme Court of Arkansas violated not only its own Rules and its own orders based upon statutory requirements, and thereby abused the discretion vested in it as a court, but it thereby violated also the statutes covering and regulating such Rules and such orders; in all of which it is guilty not only of violating the laws of Arkansas but in so doing it has broken faith with the appellants (petitioners herein) and has denied them the due process of law and equal protection under the laws as their inherent rights guaranteed to them by the Constitution and laws of the State of Arkansas and by the Fourteenth Amendment to the Constitution of the United States of America.

Petitioners submit that this presents a nice question and a special and important reason for exercise of this Court's power of supervision for review on writ of *certiorari.*

MILITARY SERVICE PREVENTS DEFENSE

The action of the trial court which these petitioners now are endeavoring to correct was that which took place during World War years of 1942-1943 and thereafter, while petitioner Adam Empie Potts was actively and strenuously engaged, as a colonel of anti-aircraft artillery, in the military service, defending our nation. During the four years prior to that time, the respondents (then plaintiffs) themselves had delayed the progress of this case, while they were actively litigating *among themselves,* in a suit which did not

concern nor affect these petitioners and of which these petitioners knew nothing at the time (*Sheltering Arms, etc.*, v. *Shinberger*, 201 Ark. 780, 146 S.W. 2d 921). After which the respondents again delayed the instant suit, by surveys of the property (R. 49-88) and other methods, covering several years more, while they derived from it handsome revenues, from high-priced cotton, which revenues rightfully belonged to these petitioners; which policy the respondents continued until after the actual fighting and enthusiasm of the war had ceased (and the prospect nearing that Colonel Potts and his brothers soon would come in for their rights), then the respondents closed in for their final decree in September 1947, after petitioners had been denied trial on the merits of the cause during the earlier stages of this litigation, in 1942-1943, when petitioner Adam Empie Potts' motion for stay of action had been ignored and, later, denied by the trial court, at a time when his absence in active military combat service prevented his doing anything in his own behalf, except by proxy to plead his immunities under the Soldiers and Sailors Civil Relief Act of 1940 and amendments.

Final action of the trial court was accompanied by many variations (R. 88-110; 112-113; 120-123; 127-129; 129-131; 154), appeal from which these petitioners were granted (R. 123) and took to the Supreme Court of Arkansas (R. 159); and it is the most unusual and unjustified action of the Supreme Court of Arkansas (R. 183-187; 194) which these petitioners now ask to be reviewed by this Honorable Court and for which a writ of *certiorari* now is prayed.

The record shows throughout that petitioner Adam Empie Potts was a necessary witness at any stage and at all stages of the proceedings (R. 5-10; 47-48; 114-116; 119; 139;

141; 143; 145-147; and all through the record), for his brothers as well as for himself, and that his active military service prevented his attendance. Upon decease of their mother, Mrs. Isabelle Sheppard Potts, intestate, in 1930, said Adam Empie Potts had been appointed administrator of her estate (R. 139) and, as such administrator, had in his possession all of her records and business papers concerning this Arkansas property (R. 141). These documents and business files are voluminous and, due to his military service, were packed in numerous boxes and trunks, along with other personal possessions of said petitioner, and stored in various places of safety (R. 146) and they could not be located nor identified by anyone but petitioner Adam Empie Potts personally (just as would be the case with the private business files of any business or professional person).

After the delay incident to the repondents' own internal litigation, that litigation was terminated by decree on mandate (R. 40-44) shortly before the attack at Pearl Harbor, which brought our nation into active combat. At the Pearl Harbor attack, petitioner Adam Empie Potts took an active part in the defense, as the colonel whose regiment is credited with shooting down the first Jap planes of World War II. With his responsibilities so vitally important to our National defense, it would have been impossible for him to have obtained an indefinite leave of absence, possibly several years, to defend his private property rights in Arkansas; indeed, it would have been impossible for him to have had a single moment except for the then all-important matter of the military defense of our nation, and it would have been utterly useless and worse than ridiculous for him to have requested or even to have mentioned such a leave of absence, either then or in the years ensuing, until his release from active duty, on January 1, 1949.

Under the circumstances, the petitioner did the only thing he could do, he did what the Congress of the United States commanded him to do and for which the Congress had provided, he claimed his immunities under the Soldiers and Sailors Civil Relief Act and asked the trial court for stay of action as expressly provided in said Act, as required by emergent war-time conditions and as demanded by Public Policy, to insure to petitioner a trial on the merits of his cause, to insure to him his inherent rights to due process of law and equal protection under the laws as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States of America.

These petitioners are not debtors nor alleged wrong-doers nor are they seeking immunity from any obligation, but they are defending their family estates against utter strangers, who, without title and without interest in the property, have been permitted by the Arkansas courts to file an alleged "partition" suit, to claim petitioners' property; and said courts have decreed a sale of the property which belongs solely to these petitioners and their brother; all of which has been done without any trial on the merits of the cause and during the absence of petitioner Adam Empie Potts in active military combat service. And yet, because of such military service, this litigant has been insulted gratuitously and stigmatized as one who would make improper use of the Soldiers and Sailors Civil Relief Act! With these facts before it, we believe the Supreme Court of the United States, our Nation's highest tribunal, will not deny *certiorari* when it fully understands the issues involved herein. Will this Court of last resort fail to give relief to these petitioners, who come honorably and in good faith?

In *Boone* v. *Lightner,* 319 U. S. 561, this Court says:

> "As the decision below presented an important question of construction of the Act, we granted *certiorari.*"

Petitioners contend that the instant case of *Potts* v. *Rader* (219 S.W. 2d 769) presents a yet *more important question,* of Nation-wide consequence.

In its opinion in the *Boone-Lightner* case, *supra,* at page 565, this Court says that stay of action must be granted the litigant in the military service "unless, in the opinion of the court, the ability of . . . the defendant to conduct his defense is not materially affected by reason of his military service." But, in the instant case, the trial court had no fact and no evidence on which to base such *opinion* (all the testimony and other evidence showing completely that this service man's ability to defend was *materially affected* by reason of his military service (R. 139; 141; 143; 145; 146; 147); in which case, to deny stay of action as provided by the Soldiers and Sailors Civil Relief Act was a flagrant abuse of the trial court's discretion, was a serious abuse of authority and constituted grave reversible error; and when the Supreme Court of Arkansas refused to consider the testimony favoring the petitioner (R. 185), in the record brought before it *upon its own orders* (R. 159-166; 182) ,and affirmed the obviously erroneous decree of the trial court, such unusual action appears certainly to justify review under the power of supervision to be exercised by the Supreme Court of the United States.

In *Boone* v. *Lightner,* 319 U.S. 561, at 572, this Court said:

"The final question is whether the *evidence* sufficiently supports the *opinion* or whether the order constitutes an abuse of discretion."

Such construction as the Supreme Court of Arkansas placed upon this Court's decision in the *Boone-Lightner* case, *supra*, completely nullifies any and all benefits and protection for any service man under provisions of the Soldiers and Sailors Civil Relief Act—nullifying the Act in such states.

If courts are permitted to commit such abuse of authority, it means simply that, when those enjoying the court's favor wish to acquire some valuable property, all they need do is have the owner inducted into the military service and then bring a suit and have the court's "opinion" decreed in their favor and against the interest of the service man; or, they may select a nice piece of property belonging to one already in the military service.

We realize that there is a Just GOD and retributive justice; and we recognize too that our stewardship on this earth requires also that we exert our very best in conscientious human endeavor. And when people residing in one state own property in another state, their only protection now is the Supreme Court of the United States. Otherwise, without such protection, any claimant may prosecute and sustain any false claim—and the real owners in the distant state have no redress. United States District Courts and Circuit Courts of Appeals have been provided for some such cases; but, since petitioners now are precluded from relief in such courts, the only forum is our Nation's Supreme tribunal.

If state courts of last resort are to be permitted to render decisions arbitrarily upholding the errors of trial courts in inequitable and unjust judgments to favor litigants with invalid claims, and thereby divesting honest people and taking their life's savings or their family inheritances, it may become an abuse of authority so prevalent and so widespread as to cause nation-wide alarm and to constitute a national menace.

What incentive to our military personnel to know that, while they are on active combat duty in the armed forces of the military service, defending our Nation, the state courts are permitting their property to be taken from them in their absence in such military service? What incentive to our People to give enthusiastic support to a Government administration which lives not up to the Constitutional guarantees of the Nation and which affords them little or no protection in their inherent rights?

SUBSTANTIAL JUSTICE is the basis of all Law and Order; and, that such substantial justice be done and that such law and order be not stifled, these petitioners contend that the inequity and injustice of the Arkansas Supreme Court's decision in the matter of *Potts* v. *Rader* (219 S.W. 2d 769) constitutes an error so grave as to merit review and correction by the Supreme Court of the United States as the only tribunal having the power of supervision required to correct such error in state courts of last resort and thereby to secure to military personnel and the general public the due process of law and equal protection under the laws as their inherent rights guaranteed to them by the Fourteenth Amendment to the Constitution of the United States of America.

Although the facts of his service are known and proven, yet the courts have shown him no courtesy and no consideration and, furthermore, the opinions of the courts have have placed upon Colonel Potts the insult and the odium of trying to make it appear that he was attempting to make improper use of the immunities provided by the Soldiers and Sailors Civil Relief Act! A gallant and conscientious colonel who has rendered distinguished service, with a brilliant war record, given no protection and shown no consideration whatever, insulted, and wrongfully deprived of his property, during his absence in military service, fighting in defense of Our Nation! Can the Supreme Court of the United States now fail to exercise its power of supervision, that equity and substantial justice may prevail in this case? Does not this situation present sufficiently "special and important reasons" for consideration and for issue of the necessary writ of *certiorari* to review the decision of the Arkansas courts in this matter? Even in the absence of the Soldiers and Sailors Civil Relief Act, would not Public Policy and Public Conscience demand such action? Is not such action now obviously to protect not only the petitioner herein but all other military personnel and everyone generally in similar emergency?

When a litigant in the military combat forces of our Nation has rendered noteworthy service, and when the physical facts and all testimony and all evidence show conclusively that he was and is a necessary witness and that his presence and his testimony and other evidence are needed to protect his own and his brothers' interests in their cause, it is inconceivable that any of our courts would deny to such litigant his day in court, deny him a proper trial on the merits of his cause, and thereby permit his opponents to deprive him of his family inheritance, merely because of such

military service (and on the unsworn, unverified and undeniably prejudiced and obviously incorrect statements of counsel for his opponents).

CONCLUSION

The record shows that the issue involved in this cause is ownership of Sheppard Island Plantation as property belonging solely to these petitioners and their brother, as shown in the answers filed by these petitioners in the trial court (R. 5 to 12), and that the devastavits of A. B. Guigon, Jr., are incidents only. The record shows that, in the entire course of this litigation, only once has any continuance been asked by the petitioners, and that in 1939 (R. 15), without knowing that the case already had been continued by the respondents themselves (then plaintiffs) because of their own internal controversy (R. 12), which was not settled among them until decree on mandate, October 10, 1941 (R. 40). The record shows further that, in the "motion to dismiss" (R. 169 to 182) made and filed by their attorney, the respondents attempted to cloak their own delays and to make them appear as delays caused by the petitioners; but in such "motion to dismiss," respondents have admitted delays "not attributable to James Sheppard Potts" (R. 178, line 30; and R. 180, line 7), which cover the entire course of the litigation and show by respondents' own admissions that *no* delays were attributable to these petitioners; yet the respondents' entire case has been predicated upon the subject of "delays," *for which the respondents themselves admittedly are wholly responsible.* But the record shows also that the decision and opinion of the Arkansas Supreme Court (R. 183 to 187) were not based upon the facts in the record but were based upon respondents' aforesaid "motion to dismiss" and follow the language of said motion (which said motion appears to be

unsworn, unverified as required by statute and by rules of the said court, and the statements in which are obviously incorrect and prejudiced and appear to have been intended to prejudice the court), which said motion appears not to have been lawfully nor properly before the court and should not even have been considered by the court.

The record shows also that petitioners had filed with the Supreme Court of Arkansas a transcript of the complete record as required and in accordance with statute and rules of that court and upon that court's express order *per curiam* (R. 182) in addition to its four writs of *certiorari* (R. 159 to 166), and that under such circumstances, the court had no lawful right to refuse to consider such record in its entirety.

Petitioners contend that this case contains federal questions of the most vital importance, affecting the lives and fortunes of the American People, questions of their inherent Constitutional rights and of Public Policy and military immunities under the Soldiers and Sailors Civil Relief Act, all of which appear to be well defined issues in this case and which appear to present reasons of special importance to the people of our Nation and which justify a writ of *certiorari* by this Honorable Court, as reqeuested herein.

With such facts as these alleged and brought to its attention, surely this Honorable Court will not refuse this opportunity to review such abuse of authority, to protect not only the petitioners but the entire American Public; to accomplish which, this Court very respectfully is urged to issue the necessary writ of *certiorari* to the Supreme Court of Arkansas.

Writ of *certiorari* was denied these petitioners on October

17, 1949; and this Petition for Rehearing and Reconsideration is being filed herein before or by October 31, 1949; copies of same having been forwarded to opposing counsel on October 29, 1949.

Respectfully submitted,

JAMES SHEPPARD POTTS

ADAM EMPIE POTTS

Petitioners

CERTIFICATE OF PETITIONERS

We, the undersigned petitioners in above-entitled cause, hereby certify that the foregoing petition for rehearing and reconsideration is presented in good faith and not for delay and that it is restricted to substantial grounds not previously presented to this Court (any other references being necessarily incidental).

October 29, 1949

JAMES SHEPPARD POTTS

ADAM EMPIE POTTS

145 South Colonial Avenue
Richmond 21, Virginia,

Petitioners

Petitioners

October 28, 1949.